Opinion No. 63-24
R-252
June 14, 1963

REQUESTED BY: HONORABLE H.S. CORBETT
Arizona State Senate

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS:

1. Does the phrase "all items of construction or reconstruction involving an expenditure of $10,000.00 or over" found in A.R.S. §18-217 require that all costs of labor, materials and various other costs and expenses of the construction or reconstruction be taken into account in determining whether the expenditures equal or exceed $10,000.00?

2. May a county use its road maintenance equipment on the construction of new road projects to perform a portion of such construction, where the cost of such portion is less than $10,000.00, if such portion is ordinarily and normally considered as being a continuous, indispensable segment of a completed road construction project usually completed during one continuous period of time, and where the total cost of such project is $10,000.00 or over?

ANSWERS:

1. Yes.

2. No.

In substance, the two questions are closely related. The first inquires whether the various components making up the total cost of the construction job or project can be considered separately to determine whether competitive bidding is required as to each such component; the second inquires whether segments or portions of what is generally regarded as one construction job or project can be considered separately to determine whether competitive bidding is required as to each such segment or portion.

The statute in question, A.R.S. §18-217, states as follows:

"A. In a county of the first class having a population of one hundred fifty thousand or over, bids for all items of construction or reconstruction involving an expenditure of ten thousand dollars or

over, all purchases or other acquisition of equipment involving an expenditure in excess of five thousand dollars, and all purchases of supplies and materials involving an expenditure of two thousand five hundred dollars or over, shall be called for by advertising in a newspaper of general circulation published within the county for two consecutive insertions if it is a weekly newspaper, or for two insertions not less than six nor more than ten days apart, if it is a daily newspaper. The advertisement shall state specifically the character of the work to be done, and the kind and quality of materials or supplies to be furnished. (Emphasis supplied)

"B. Should a bid satisfactory to the board of supervisors be received, it shall let a contract to the lowest responsible bidder upon the contractor or supplier giving such bond or bonds as are deemed necessary; or the board may reject all bids and readvertise.

"C. The bond may be required to contain a power of attorney to confess judgment upon the bond in the event of a default in the contract to the full amount, or any part of the bond, and a confession of judgment made pursuant thereto shall be valid and binding upon the contractor and the surety.

"D. No board of supervisors, member thereof, or other official or agent of a county affected by this section shall segregate or divide into separate units a contiguous or continuous portion of highway construction or reconstruction; or divide into separate portions an item of equipment or generally recognized unit of supplies or material, in order to avoid the restrictions imposed by subsection A of this section." (Emphasis supplied)

The statutory language used in A.R.S. §18-217 does not appear ambiguous. It seems clear that the Legislature intended that where construction involves expenditures of $10,000.00 or over, then all items thereof are subject to the competitive bidding requirement. Such intention is made particularly apparent by the fact that the Legislature included Section (D)

of A.R.S. §18-217, supra. A contrary view, to the effect that the qualifying amount of $10,000.00 applies separately to each individual item of cost or to segments of construction, not only does violence to the language of the statute, but would defeat or substantially nullify its purpose and objective.

Further, in construing the above statute, it is important that the legislative intent be followed if possible. This we have done. See Weigel v. Hahn, 45 Ariz. 81, 39 P.2d 933; State v. McEuen, 42 Ariz. 385, 26 P.2d 1005; Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069; Westerlund v. Croaff, 68 Ariz. 36, 196 P.2d 842, 115 A.L.R. 254.

The object the Legislature sought to accomplish by requiring competitive bidding in the expenditure of county funds for highway construction or reconstruction was to guard against favoritism, improvidence, extravagance, fraud and corruption. McQuillan, Municipal Corporation, L Ed. Vol. 10, Sec. 29.29; 63 C.J.S., Muricipal Corp., Sec. 995.

> "Contracts for the performance of work or the supplying of materials are let, ordinarily as an incident of procedure prescribed by statute or municipal law the purpose of which is to secure competitive bidding on the part of intending contractors, and prevent favoritism, collusion, and fraud in the letting of such contracts to the detriment of the public; and generally, in order to hold a public body liable on contracts entered into by its agents or officers, the statutory method of execution must be complied with." 43 Am. Jur., Public Works, Sec. 23.

It is generally believed that the public interests are best protected and public funds are best conserved by following the basic policy of requiring major classes of expenditures to be made under competitive bidding requirements.

> "Experience has shown, however, that the interests of the public are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it, and in most, if not all, jurisdictions there are mandatory and

> preemptory constitutional and statutory provisions, as well as provisions of municipal charters and ordinances, which prescribe competitive bidding by all persons who wish to obtain such contracts, and the letting by public authorities of the contracts to the lowest bidders, etc., at least with respect to contracts exceeding a specified amount or estimated cost." 43 Am. Jur., Public Works, Sec 24. (Emphasis supplied)

The Arizona Supreme Court on several occasions has recognized the underlying purpose, as above stated, of legislative requirements that expenditures be by competitive bidding, and it has also demonstrated that such legislation will not be interpreted and applied in a manner to defeat those purposes. In Southern Surety Co. v. City of Prescott (1924) 26 Ariz. 66, 221 Pac. 834, a contract for the paving of a street had been properly let under competitive bidding pursuant to the mandate and procedures of the applicable statutes. Subsequently, a city employee negotiated a reduction in the contract price by eliminating one work requirement. Upon default by the contractor, the surety company completed the job and demanded payment pursuant to the term of the contract. The court said:

> " . . . The law under which this contract was made provides that the work shall be let to the lowest bidder. The bids for the doing of this work were invited and made and received upon the basis of specifications containing the so-called freezing clause. After all other bidders had been eliminated, the superintendent of streets undertakes to barter with the successful bidder for the elimination of one element of expense, in consideration of the payment of upwards of $4,700.
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> "It does not appear how much the other bidders estimated the hazard entailed by that clause. Nobody knows whether the work might have been done with that clause eliminated for $3,000, $4,700, or $5,700 or $10,000 less, or whether the $4,700 represents more or less than some other bidder would have paid for the same privilege. Such a transaction destroys the whole plan of having work done by the lowest bidder;

> the only plan which protects the property owner from improvidence and fraud. There is no intimation and no doubt but what in this instance the officer acted honestly and conscientiously, though ill-advisedly and unlawfully; but the method he employed is one which might be used by an unscrupulous officer with a great loss and damage to the property owners, and is prohibited by statute." (Emphasis supplied)

Also see Osborn v. Mitten (1932) 39 Ariz. 372, 6 P.2d 902 and Brown v. City of Phoenix (1954) 77 Ariz. 368, 272 P.2d 358.

Where, as in this instance, the requirement of competitive bidding depends upon the "amount involved", with transactions involving a lesser amount being excepted from such requirement, the statute might be interpreted to accomplish the legislative objective of requiring competitive bidding and not in a manner which will fritter away such requirement by expanding the scope of the exception as to contracts or transactions involving the lesser amount.

> "In some jurisdictions, the necessity of competitive bidding depends upon the amount involved in the contract to be let. If applicable, such a requirement must be observed in good faith by the acting municipal authorities. And where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding." 10 McQuillan, Municipal Corporations, Section 29.33. (Emphasis supplied)

These principals of statutory construction were well stated by the Court in Fonder v. South Sioux Falls, 76 S.D. 31, 71 NW (2d) 618, 53 A.L.R. (2d) 493. In that case the statute provided:

> "All contracts of any public corporation, whether for the construction of public improvements or contracts for the purchase of materials, supplies or equipment, when such contracts . . . involve

an expenditure equal to or in excess of $500.00, . . . must be let to the lowest responsible bidder . . . . "

The issue was whether a city, having a recognized constant need for a considerable supply of gravel for use in the maintenance and repair of its streets, involving an expenditure of some $8,000 over a period of eight months, was prevented from purchasing gravel without competitive bids, under separate orders or contracts, each of which involved an expenditure of less than $500. Holding that such purchases were subject to the competitive bid requirement, the Court said:

"The intention to regulate the purchase of all materials, supplies and equipment by public corporations is made manifest by the express terms of this statute. For obvious reasons small contracts were excepted from its provisions. However, by introducing this exception dealing with small contracts, it is inconceivable that the lawmakers intended to provide a lawful means by which its prime objective to require that the major needs of the public for materials, supplies or equipment be met through competitive lettings could be circumvented by multiple small open market purchases. For that reason we are firmly persuaded that given a present need for gravel costing several thousand dollars for immediate application to its streets in the maintenance and repair thereof, a city would violate the provisions of this statute if it sought to meet that need, without competitive bids, through multiple contemporaneous orders or contracts, each involving less than $500. McQuillan, Municipal Corporation, 3d Ed. Sec. 29.33. By parity of reasoning we are also convinced that given a recognized current need for such a supply of gravel for application over a period of weeks or months, a city would violate this statute, if, without competitive bidding, it attempted to meet that apparent need through multiple noncontemporaneous contracts. To arrive at a different conclusion, we would be compelled to ignore the object and spirit of this legislation." (Emphasis supplied)

In the case of Horrabin Paving Co. v. Creston, (1935) 221 Iowa 1237, 262 N.W. 480, a statute required that contracts of a city involving more than $5,000 were required to be submitted to competitive bidding. The Court held that four contracts for resurfacing and repairing each of four streets were subject to the competitve bidding requirement, although standing alone, each contract involved less than $5,000. And in Miller v. McKinnon (1942) 20 Cal. (2d) 83, 124 P.2d 34, an action was brought against the County Supervisors and a contractor to recover money paid under an allegedly illegal contract for repair and alterations to a county owned quarry. In reversing a judgment of dismissal on demurrer to the complaint, and referring to the statute which required bids on any contract which exceeded $500, the Court said:

> "It must be true that the salutary public policy declared by that section may not be thwarted by the device of splitting a job into many items, each calling for an expenditure below the prescribed amount in excess of which competitive bidding is required."

Also see Brown v. Bozeman (1934) 138 Cal. App. 133, 32 P. 2d 168.

For other cases holding invalid contracts or payments which, viewed individually, were under the amount which the statute established as requiring competitive bids, but where it was apparent that the various small contracts or the various payments were but a part of a larger contract or a single project the total of which was sufficient to require competitive bids, see Gamewell Fire Alarm Tel. Co. v. Los Angeles, (1919) 45 Cal. App. 149, 187 Pac. 163; People ex rel. Whitlock v. Lamon, (1908) 232 Ill. 587, 83 N.E. 1070; Brownell Improvement Co. v. Highway Commissioner, (1935) 280 Ill. App. 43; Tompkinsville v. Miller, (1922) 195 Ky. 143, 241 S.W. 809; State v. Kollarik, (1956) 22 N.J. 558, 126 Atl. (2d) 875; Ellis v. New York, (1861) 1 Daly 102; Re Paine (1882) 26 Hun 431, affirmed 89 N.Y. 605; State Use of Ashland County v. Snyder, (1904) 2 Ohio NP NS 261, 14 Ohio Dec. NP 568; Fire Extinguisher Mfg. Co. v. Perry, (1899) 8 Okla. 429, 58 Pac. 635; United States Rubber Co. v. Tulsa, (1924) 103 Okla. 163, 229 Pac. 771; Re Summit Hill School Directors, (1917) 258 Pa. 575, 102 Atl. 278; Re Audit of School District of Scranton, (1946) 354 Pa. 225, 47 Atl. (2d) 288; Kelly v. Cochrane County, (1935) 125 Texas 424,

82 SW (2d) 641; Tobin v. Sun Dance, (1933) 45 Wyo. 219, 17 P. 2d 666; Shore Gas & Oil Co. v. Spring Lake, (1953) 27 N.J. Super 33, 98 Atl. (2d) 689; Walton v. New York, (1898) 26 App. Div. 76, 49 N.Y.S. 615; Ludwig Hommel & Co. v. Woodsfield, (1927) 115 Ohio St. 675, 155 NE 383; Heinz v. Bellefontaine, (1943) 74 Ohio App. 393, 57 NE (2d) 164; Re German Township School Directors, (1941) 46 Pa D & C 562, 6 Fayette Leg. J. 15; and State ex rel. Butler v. Dugger, (1938) 172 Tenn. 281, 111 SW (2d) 1032.

Therefore, in conclusion, it is our opinion if a construction job or project involves a total cost of $10,000 or over, the competitive bidding requirement applies to all of the various elements which make up such total cost. No component cost or segment thereof can be excepted from this requirement because it, standing alone, involves less than $10,000. Also, in determining whether the construction involves expenditures of $10,000 or over, all elements or components making up the total cost must be included and none may be excluded on the ground that the individual component or segment, considered separately, is less than $10,000.

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